

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MICHAEL A. MICHALSKI, :
 :
 Petitioner Requester :
 :
 :
 v. : No.
 :
 :
 PENNSYLVANIA DEPARTMENT OF :
 :
 CORRECTIONS AND KIMBERLY GRANT :
 :
 (DAORO), :
 :
 Respondents :

RECEIVED
APR 19 2023
OFFICE OF OPEN RECORDS

PETITION FOR REVIEW

1. Petitioner Requester, hereafter referred to as Requester, submits this Petition for Review in accordance with 65 P.S. §67.1301(a).
2. Requester, Michael A. Michalski, an adult individual, is currently incarcerated at State Correctional Institution at Albion.
3. Respondents are the Pennsylvania Department of Corrections and Deputy Agency Open Records Officer Kimberly Grant, hereafter referred to as DAORO. Respondents are a Commonwealth Agency located at 1920 Technology Parkway, Mechanicsburg, PA 17050.
4. Requester appeals to this Court a Final Determination Denial (Docket No. AP 2023-0438) (Exhibit F) from the Office of Open Records (OOR) of a Pennsylvania Right-To-Know Law

Request which was originally denied by DAORO (RTKL #0095-23)(Exhibit B).

PROCEDURAL SUMMARY

5. On 1/24/23, Requester filed original RTKL request to PA DOC attempting to receive records related to eight (8) PA DOC Institution's Netflix viewing histories (Exhibit A). DAORO responded to this request on 2/14/23, denying the request (Exhibit B) on the grounds that:

A. "The record(s) that you requested do not currently exist in the possession of the Department or Corrections..." and;

B. "The requested information does not meet the statutory definition of a "Record" under the RTKL..."

6. On 2/23/23, Requester filed a timely Appeal to the denial to the OOR, listing detailed arguments in opposition of the denial (Exhibit C).

7. On 3/7/23, Requester was mailed the Department's Position Statement by Assistant Counsel Tara J. Wikhian (Exhibit D).

8. On 3/16/23, Requester mailed copies of supplemental information to the Appeals Officer and the Department's Counsel which pointed out contradictions in the Department's Position Statement, as well as citing applicable RTKL statutes and case law in support of receiving the records requested (Exhibit E).

9. On 3/28/23, OOR Appeals Officer, Blake Eilers issued and mailed the Final Determination in which he denied the Appeal on the grounds that, "...the Netflix histories are not records of the Department..." (Exhibit F, pg 5).

10. Both the Respondents and OOR erred in their judgement/determination in claiming

exemptions to records based on erroneous claims.

CLAIM 1 - RECORD DOES NOT EXIST IN THE POSSESSION OF THE AGENCY

11. Both the PA DOC (Exhibit D) and OOR (Exhibit F pg 4/5) aver that being the records are from the Netflix website, the PA DOC Netflix histories, "are not records of the Department" and are not in the Agency's possession.

12. "The location of a public record is not at all a relevant consideration in terms of the public's right to access. the RTKL, 65 Pa. Stat. Ann. §67.701(a), provides that all public records shall be accessible. It is not limited to public records in the possession of the Agency. Similarly, 65 Pa. Stat. Ann. §67.302(a) requires local agencies to provide public records in accordance with provisions of the RTKL, not just records in the possession of the local Agency. Indeed, 65 Pa. Stat. Ann §67.506(d)(3) provides that a request for a public record in the possession of a party other than the Agency shall be submitted to the Open Records Officer of the Agency. Thus, under those provisions, the Pennsylvania General Assembly clearly and unambiguously contemplated that all public records, regardless of where they are located, should be accessible to the public." Allegheny County Dep't of Admin. Services v. Second Chance, Inc. 13 A.3d 1025m 2011 PA Commw. Where the Pennsylvania General Assembly defines a term used in a statute, a court is bound by those definitions.

13. Further, DAORO and OOR claim that being the records are not maintained by the Department, that they do not exist. 65 Pa. Stat. Ann. §67.901 (records that do no exist) has a litmus test with regards to Constructive Possession. Courts recognize Constructive Possession under §901 as a means of access so agencies cannot frustrate the purposes of the RTKL by placing their records in the hands of third parties to avoid disclosure. However, a court does not infer Constructive Possession from the mere availability of records to an Agency upon request. The litmus test under §901 remains whether the records document a transaction of

the Agency to which the request was directed, as in this Appeal.

CLAIM 2 - REQUEST DOES NOT MEET THE DEFINITION OF A RECORD

14. The DAORO and OOR aver that because the records are not maintained by the Department that they do not exist. Section 102 of the PA RTKL, 65 Pa. Stat. Ann. §§67.101-67.3104 defines a "Record" as "...information, regardless of physical form or characteristics, that documents a transaction or activity of an Agency and that is created, received, or retained pursuant to law or in connection with a transaction, business, or activity of the agency. 65 Pa. Stat. Ann. § 67.102.

15. A public record is, by definition under 65 Pa. Stat. Ann. §67.102, a record that is not exempt. Applying the strict statutory definition, then would require a court to read 65 Pa. Stat. Ann. §67.506(d)(1) to provide that a record that is not exempt, meaning a public record, so long as it is not exempt, shall be considered a public record of the Agency. Similarly, a public record is, by definition under 65 Pa. Stat. Ann. §67.102, a record of the local Agency.

ARGUMENT

16. The denials by both the DAORO and the OOR are both deficient in their nature and counter to applicable portions of the RTKL.

17. Further, the OOR Appeals Officer's response was inadequate as he did not fully answer each of the Requester's claims and failed to assess whether or not Section 506(d) applied to the instant Appeal as he erred in making a Determination that the Netflix histories "are not records of the Department" (Exhibit F).

18. Requester first must demonstrated to this Court that the Netflix histories are a record. As list in Claim 2 of this PFR, a public record is any record that is not exempt. Further, it is defined as:

"...information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received, or retained pursuant to law or in connection with a transaction, business, or activity of the agency." 65 Pa. Stat. Ann, §67.102.

19. Analysis of the question proves the records requested meet the statutory definition:

- A. The "Department", *i.e.* PA DOC, is a Commonwealth Agency.
- B. This *Agency* operates approximately 24 facilities across the Commonwealth.
- C. These facilities operate "Activities Departments" pursuant to Department Policy 7.8.1.
- D. Most of these Activities Departments subscribe/contract with Netflix's mail order DVD service to provide entertainment options for the inmate population.
- E. Activities Staff, *i.e.* Commonwealth employees, use the Netflix website to order and receive DVDs at each applicable facility which are played for the inmate population.
- F. The Netflix website is used to monitor transactions, such as shipments and returns, report trouble tickets, advising the user if they had previously ordered a DVD, etc.
- G. The Institution's Netflix history is contained on each individual account's History tab, or can be downloaded from it's database in a usable format (*i.e.* .CSV *file*). (Sample of SCI-Albion's history, exhibit 5)

20. Points A-G above clearly demonstrate, per the statutory definition of a record (Section 102), that the Netflix Histories, "documents a transaction or activity of an agency" and "is created, received, or retained pursuant to law or in connection with a transaction, business, or

activity of the agency."

21. The OOR appears to admit that these records "document the existence of a government action" (exhibit F pg. 4), but that they are not maintained in connection with this activity (exhibit F pg. 4/5). Netflix maintains these records pursuant to a subscriber/contractual agreement for the Department which are retained in connection with each transaction and activity of the agency.

22. As stated in Claim 1, "The location of a public record is not at all a relevant consideration in terms of the public's right to access. The RTKL, 65 Pa. Stat. Ann, §67.701(a), provides that all public records shall be accessible. It is not limited to public records in the possession of the agency."

23. Section 506(d)(1) is clear that it mandates access to public records, "in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency for the purposes of this act."

24. To reach records outside an agency's possession, the following two elements must be met: (1) The third party performs a governmental function on behalf of the agency; and (2) The information sought directly relates to that function. Accordingly, non-exempt records of a third party may be subject to disclosure, provided the third party in possession has a contract with the agency to perform a governmental function, and the information directly relates to the performance of that function. *see Dental Benefits Providers, Inc. v. Eiseman* 86 A.3d 932 October 9, 2013. Both elements have been met in the instant case.

25. As stated previously, Netflix maintains these records in relation to a government function, that is the Department ordering, receiving, and returning movies on a recurring basis, and documents these transactions in a History database which can either be viewed on the website

or downloaded by the Department into a .CSV file for offline use. This file is compatible with Microsoft Excel, a Department-wide program.

26. Additionally, "drawing information from a database does not constitute creating a record under the PA RTKL, 65 Pa. Stat. Ann. §§67.101-67.3104." "An agency can be required to draw information from a database, although the information must be drawn in formats available to the agency. In short, to the extent requested information exists in a database, it must be provided; an agency cannot claim otherwise under §705 of the PA RTKL, 65 Pa. Stat. Ann. §§ 67.101-67.3104. 65 Pa. Stat. Ann. §67.705" (Commwlth of Pa Dep v. Vera Cole 9/12/12 LexisNexis Headnotes).

27. The commonly used definition of Database is:

"A usu. large collection of data organized esp. for rapid search and retrieval (as by a computer)"

28. Requester seeks a ruling in his favor, as if the OOR's Final Determination is left in place, will allow the Respondents to prevent public access to a wide range of public records maintained by it's many third party contractors, such as, but not limited to; GTL/Viapath, Securus, CCTV, Aramark, Smart Communications, Union Supply, Keefe, etc.

29. Requester also seeks reimbursement for the costs associated with filing this PFR.



Michael A. Michalski GJ8047

Michael Michalski GJ8047
10745 Route 18
Albion, PA 16475-0002

Table of Contents

A. Original Request (PA DOC RTKL#0095-23)

B. Agency Denial

C. Appeal to OOR (Dkt. No. AP 2023-0438)

D. Agency Position Statement

E. Requester's Supplemental Information

F. OOR Final Determination

G. Example of previously granted Netflix History (SCI-Albion)

A-1

Received

JAN 31 2023



pennsylvania
OFFICE OF OPEN RECORDS

Right-to-Know Office, Tracking #

0095-23

Standard Right-to-Know Law Request Form

Good communication is vital in the RTKL process. Complete this form thoroughly and retain a copy; it is required should an appeal be necessary. You have 15 business days to appeal after a request is denied or deemed denied.

SUBMITTED TO AGENCY NAME: PA DOC (Attn: AORO)

Date of Request: 1/24/23 Submitted via: ☐ Email ☒ U.S. Mail ☐ Fax ☐ In Person

PERSON MAKING REQUEST:

Name: Michael Michalski GJ8047 Company (if applicable): Smart Communications/PA DOC

Mailing Address: PO Box 33028

City: ST. PETERSBURG State: FL Zip: 33733 Email: _____

Telephone: _____ Fax: _____

How do you prefer to be contacted if the agency has questions? ☐ Telephone ☐ Email ☒ U.S. Mail

RECORDS REQUESTED: Be clear and concise. Provide as much specific detail as possible, ideally including subject matter, time frame, and type of record or party names. Use additional sheets if necessary. RTKL requests should seek records, not ask questions. Requesters are not required to explain why the records are sought or the intended use of the records unless otherwise required by law.

SEE ATTACHED

DO YOU WANT COPIES? ☐ Yes, electronic copies preferred if available

☒ Yes, printed copies preferred

☐ No, in-person inspection of records preferred (may request copies later)

Do you want certified copies? ☐ Yes (may be subject to additional costs) ☐ No

RTKL requests may require payment or prepayment of fees. See the Official RTKL Fee Schedule for more details.

Please notify me if fees associated with this request will be more than ☐ \$100 (or) ☐ \$_____.

ITEMS BELOW THIS LINE FOR AGENCY USE ONLY.

Tracking: _____ Date Received: _____ Response Due (5 bus. days): _____

30-Day Ext.? ☐ Yes ☐ No (If Yes, Final Due Date: _____) Actual Response Date: _____

Request was: ☐ Granted ☐ Partially Granted & Denied ☐ Denied Cost to Requester: \$_____

☐ Appropriate third parties notified and given an opportunity to object to the release of requested records.

NOTE: In most cases, a completed RTKL request form is a public record.
More information about the RTKL is available at <https://www.openrecords.pa.gov>

Form updated Nov. 27, 2018

A-2

PLEASE PROVIDE COPIES OF THE FOLLOWING RECORDS DESCRIBED BELOW:

1) THIS REQUEST APPLIES TO EACH OF THE FOLLOWING INSTITUTIONS;

- | | |
|------------|---------------|
| a) ALBION | e) FOREST |
| b) BENNER | f) FRACKVILLE |
| c) COAL | g) SOMERSET |
| d) FAYETTE | h) WAYMART |

2) THE RANGE OF THIS REQUEST IS FOR NETFLIX MOVIES ORDERED/SHIPPED STARTING IN JUNE 2019 THROUGH AND ENDING WITH OCTOBER 31, 2021

3) THIS REQUEST SEEKS THESE RECORDS BE PRINTED DIRECTLY FROM THE NETFLIX HISTORY TAB AND INCLUDE THE PAGE RANGE IN THE PRINT DIALOG BOX FOR RANGES ASSOCIATED WITH THE ABOVE DATES.

4) A COPY OF THE MOST RECENT A DEC COMMISSARY COMMITTEE MEETING MINUTES SINCE THE AUGUST 4, 2022 MEETING.

THANK YOU

B-1

**Pennsylvania Department of Corrections
Right-to-Know Office
Office of Chief Counsel
1920 Technology Parkway
Mechanicsburg, PA 17050
Telephone 717-728-7763
Fax 717-728-0312**

February 14, 2023

Smart Communications/PADOC
Michael Michalski, GJ8047
SCI-Albion
PO Box 33028
St Petersburg, FL 33733

Re: RTKL #0095-23

Dear Mr. Michalski:

This letter acknowledges receipt by the Department of Corrections (the Department) of your written request for records under the Pennsylvania Right-to-Know Law (RTKL). Your request was received by this office on January 31, 2023. On February 1, 2023 an interim response was sent to you extending the final response date to March 8, 2023. A copy of your request letter is enclosed.

Items 1, 2, and 3 of the enclosed RTK Request are denied for the following reason:

- The record(s) that you requested do not currently exist in the possession of the Department of Corrections. When responding to a request for access, an agency is not required to create a record which does not currently exist or to compile, format or organize a public record in a manner in which it does not currently compile, format or organize the public record. 65 P.S. § 67.705; *See Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Cmwlth. 2010) ("The Department cannot grant access to a record that does not exist. Because under the current RTKL the Department cannot be made to create a record which does not exist, the OOR properly denied [the] ... appeal."); *See also Barger v. Department of Labor and Industry*, 720 A.2d 500 (Pa. Cmwlth. 1998). *See also McGowan v. Pennsylvania Department of Environmental Protection*, 103 A.3d 374, 382-83 (Pa. Cmwlth. 2014) ("In the absence of any competent evidence that the agency acted in bad faith or that the agency records exist, 'the averments in the [d]epartment's affidavits should be accepted as true.'").
- The requested information does not meet the statutory definition of a "record" under the RTKL. 65 P.S. § 67.102 (See definitions for "record" and "public record"). In order to qualify as a "record," the requested information must have a clear nexus to official Department transactions or activities. Your request does not seek information that was created, received or retained pursuant to law or in connection with transactions, business or activities of the Department. *Id.* Accordingly, the information that you seek is not subject to disclosure under the RTKL. 65 P.S. § 67.506(d)(1) and § 67.701.

Item 4 of the enclosed RTK Request is granted. The granted information is enclosed at no charge. Please note that the granted records must be redacted to protect nonpublic and sensitive data. Insofar as redaction constitutes a denial to records, the basis for the denial and instructions for filing exceptions are outlined below in accordance with the law. Corrections Officers first names have been redacted for the following reasons:

- The requested records fall within the personal security exemption of the RTKL. 65 P.S. § 67.708(b)(1)(ii). That section exempts from access any record the disclosure of which would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual. *Id.* *See also Barger v. Department of Labor and Industry*, 720 A.2d 500 (Pa. Cmwlth. 1998); *Weaver v. Department of Corrections*, 702 A.2d 370 (Pa. Cmwlth. 1997). The disclosure of the first names or first initials of corrections officers is reasonably likely to result in threats, harassment, altercations or physical harm to corrections officers, their families and/or other residents of

B-2

Michael Michalski, GJ8047
Page 2

their homes. Corrections Officers' first names or first initials are not routinely available to inmates. Disclosure of the first names or first initials will allow inmates and/or others to identify the officers, their residences and their families to orchestrate threats, harassment, altercations or physical harm. Accordingly, access to this information is exempt under the RTKL.

- The requested records fall within an exemption of the RTKL. Specifically, the RTKL excludes records maintained by an agency in connection with law enforcement or other public safety activity that, if disclosed, would be reasonably likely to jeopardize or threaten public safety or preparedness or a public protection activity. 65 P.S. § 67.708(b)(2). The requested records are records maintained by the Department in connection with its official law enforcement function of supervising the incarceration of inmates. The disclosure of the requested records would threaten public safety and the Department's public protection activities in maintaining safe and secure correctional institutions by allowing inmates or others to access information that can be used to undermine the Department's security procedures. Therefore, disclosure of these types of records is excluded under the RTKL. *Weaver v. Department of Corrections*, 702 A.2d 370 (Pa.Cmwlt. 1997).
- The requested records fall within an exemption of the RTKL. Specifically, the RTKL exempts personal identification information from disclosure. 65 P.S. § 67.708(b)(6). Personal identification information includes, but is not limited to a person's Social Security number, driver's license number, personal financial information, home, cellular or personal telephone numbers, personal e-mail addresses, employee number or other confidential personal identification number, a spouse's name, marital status, beneficiary or dependent information or the home address of a law enforcement officer or judge. *Id.*
- Furthermore, employees have a constitutional right to privacy which would be violated by the disclosure of their first names or first initials, given the nature of their job and the dangers that such disclosure would present. See Pa. Cons. Art. 1, § 1; *Times Publishing Co. v. Michel*, 633 A.2d 1233 (Pa.Cmwlt. 1993).

You have a right to appeal the above denial of information in writing to the Executive Director, Office of Open Records (OOR), 333 Market Street, 16th Floor, Harrisburg, Pennsylvania 17101. If you choose to file an appeal you must do so within 15 business days of the mailing date of this response and send to the OOR:

1) this response; 2) your request; and 3) the reason why you think the agency is wrong in its reasons for saying that the record is not public (a statement that addresses any ground stated by the agency for the denial). If the agency gave several reasons why the record is not public, state which ones you think were wrong.

Also, the OOR has an appeal form available on the OOR website at:

<http://www.openrecords.pa.gov/RTKL/Forms.cfm>.

Sincerely,

Kim Grant

Kim Grant
Deputy Agency Open Records Officer

Enclosure
cc: File

RECEIVED

FEB 28 2023 C-1

OFFICE OF OPEN RECORDS

TO: EXECUTIVE DIRECTOR, OFFICE OF OPEN RECORDS (OOR)

FROM: MICHAEL MICHALSKI GJ8047

DATE: 2/23/23

RE: APPEAL OF RTKL REQUEST DENIAL OF PA DOC REQUEST #0095-23

PLEASE ACCEPT THIS APPEAL OF THE ATTACHED RTKL REQUEST DENIAL I RECEIVED ON 2/23/23. THE ORIGINAL REQUEST WAS MAILED TO THE PA DOC AGENCY OPEN RECORDS OFFICER ON 1/25/23 AND WAS SUBSEQUENTLY ISSUED THE TRACKING #0095-23.

THE ORIGINAL REQUEST WAS FOR COPIES OF RECORDS PERTAINING TO THE RENTAL/VIEWING HISTORY OF EIGHT (8) SEPARATE DOC FACILITIES FOR SPECIFIC TIMEFRAMES. EACH OF THESE FACILITIES MAINTAINS AN ACTIVE NETFLIX SUBSCRIPTION WHICH THEY UTILIZE TO ORDER AND PLAY MOVIES FOR THEIR RESPECTIVE INSTITUTIONS.

ON 2/14/23, THE AGENCY OPEN RECORDS OFFICER, KIM GRANT, ISSUED THE DENIAL ON TWO SEPARATE GROUNDS - EACH OF WHICH I AM DISPUTING.

"DENIAL 1: "THE RECORD(S) THAT YOU REQUESTED DO NOT CURRENTLY EXIST IN THE POSSESSION OF THE DEPARTMENT OF CORRECTION, WHEN RESPONDING TO A REQUEST FOR ACCESS, AN AGENCY IS NOT REQUIRED TO CREATE A RECORD WHICH DOES NOT CURRENTLY EXIST OR TO COMPILE, FORMAT OR ORGANIZE A PUBLIC RECORD IN A MANNER IN WHICH IT DOES NOT CURRENTLY COMPILE, FORMAT OR ORGANIZE THE PUBLIC RECORD."

THE NETFLIX HISTORY IS PART OF EACH FACILITY'S NETFLIX SUBSCRIPTION. EACH FACILITY UTILIZES THIS SUBSCRIPTION ON FACILITY BASED COMPUTERS TO ORDER MOVIES/VIDEOS FOR THEIR INMATE POPULATION. THESE SUBSCRIPTIONS ARE FUNDED THROUGH EACH FACILITY'S INMATE GENERAL WELFARE FUND (IGWF). THE ORIGINAL REQUEST WAS TO PRINT THESE HISTORIES DIRECTLY FROM EACH FACILITY'S NETFLIX ACCOUNT, IN SPECIFIC DATE RANGES. THIS MEETS ANY DEFINITION OF A RECORD FURTHER, I HAVE PREVIOUSLY REQUESTED AND RECEIVED COPIES OF SIMILAR NETFLIX ACCOUNT HISTORIES FROM PA DOC FACILITIES, ALBEIT IN A SMALLER TIMEFRAME (RTL # 1108-21 AND/OR #1120-21). I SPECIFICALLY REQUESTED THESE RECORDS BE PRINTED DIRECTLY FROM NETFLIX AS IN PREVIOUS REQUESTS, SOME FACILITIES PROVIDED A TYPED RECORD FROM MICROSOFT WORD.

° DENIAL 2: "THE REQUESTED INFORMATION DOES NOT MEET THE STATUTORY DEFINITION OF A "RECORD" UNDER THE RTL. IN ORDER TO QUALIFY AS A "RECORD," THE REQUESTED INFORMATION MUST HAVE A CLEAR NEXUS TO OFFICIAL DEPARTMENT TRANSACTIONS OR ACTIVITIES."

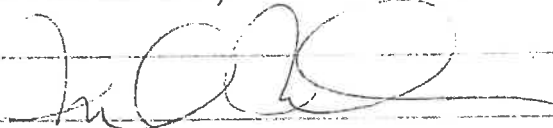
MUCH LIKE THE FIRST DENIAL, THE SECOND DENIAL IS NOT CONNECTED TO REALITY AS THE RECORDS REQUESTED ARE CLEARLY THE ACTIVITY OF AN AGENCY. AGAIN, EACH FACILITY, THROUGH ITS ACTIVITIES DEPARTMENT, HAVE A NETFLIX ACCOUNT/SUBSCRIPTION. THIS ACCOUNT IS FUNDED THROUGH/BY THE IGWF. CORRECTIONS ACTIVITIES SPECIALISTS OR CORRECTIONS ACTIVITIES MANAGERS ACCESS THIS ACCOUNT ON DEPARTMENT COMPUTERS, THROUGH THE NETFLIX WEBSITE. ONCE THERE, STAFF ADD MOVIES TO THE QUEUE

WHICH NETFLIX THEN SHIPS TO THE FACILITY. ONCE THE DISCS ARE RETURNED TO NETFLIX, MORE DISCS ARE SHIPPED AS ADDED TO THE QUEUE. AGAIN, SIMILAR RECORDS WERE REQUESTED AND RECEIVED PREVIOUSLY (RTL # 1108-21 AND/OR # 1120-21).

IN THE ABOVE WRITTEN APPEAL, I HAVE CLEARLY AND CONVINCINGLY ESTABLISHED THAT; 1. THE RECORDS REQUESTED EXIST AND ARE IN POSSESSION OF THE DEPARTMENT AND, 2. THE RECORDS ARE IN FACT A "RECORD" AND ARE RELATED TO THE ACTIVITY OF AN AGENCY.

FINALLY, WITH THE NATURE OF THIS DENIAL, WHICH IS CLEARLY IN ERROR, SO MUCH SO THAT IT DOESN'T MAKE RATIONAL SENSE — I BELIEVE IT WAS AN INTENTIONAL ACT TO INTERFERE WITH MY ACCESS TO THE COURTS. I CURRENTLY HAVE A CLAIM BEING LITIGATED IN THE U.S. DISTRICT COURT FOR THE WESTERN DISTRICT, MICHALSKI V. LITTLE No. 1:22-CV-0262 WHICH CENTERS AROUND ISSUES DIRECTLY RELATED TO THE RECORDS REQUESTED. FURTHER INVESTIGATION WILL BE DONE RELATED TO THIS DENIAL.

Sincerely,



MICHAEL MICHALSKI GJ8047

SMART COMMUNICATIONS / P.DOC

MICHAEL MICHALSKI, GJ8047

P.O. Box 33038

St. Petersburg, FL 33733

March 7, 2023

Blake Eilers, Esquire
Appeals Officer
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234

Re: Appeal No.: 2023-0438
Michael Michalski v. PA Department of Corrections

Dear Appeals Officer Eilers:

Please accept this correspondence both as my Entry of Appearance on behalf of the Pennsylvania Department of Corrections (“Department”) and also in support of its position in opposition to the above-referenced Right to Know Law (“RTKL”) Appeal, which was initiated by requester Michael Michalski. On January 31, 2023, the Department received an RTKL request from Mr. Michalski seeking, *inter alia*, the Netflix history for movies ordered/shipped, from June 2019 through October 31, 2021, for 8 specific institutions.¹ *See* Request. The Department’s Deputy Agency Open Records Officer (“Deputy AORO”) issued the Department’s Final Response on February 14, 2023, denying Mr. Michalski’s request as the records sought do not currently exist in the Department’s possession. *See* Final Response. Mr. Michalski subsequently initiated the within RTKL Appeal. *See* Appeal.

“Under the RTKL, an agency bears the burden of demonstrating that it has reasonably searched its records to establish that a record does not exist.” *Dep’t of Labor & Indus. v. Earley*, 126 A.3d 355, 357 (Pa. Cmwlth. 2015). “An affidavit may serve as sufficient evidence of the non-existence of requested records.” *Id.* Here, the Department attaches as *Exhibit A* the Declaration of Kimberly Grant, its Deputy AORO, attesting under penalty of unsworn falsification under Pennsylvania law that no responsive records exist. Specifically, Ms. Grant asserts in relevant part as follows:

¹ Mr. Michalski’s RTKL Request also sought Commissary Committee Meeting Minutes. *See* Request. The request for access to those records were granted and are not raised in Mr. Michalski’s Appeal. *See* Appeal Documents.

4. In response to Mr. Michalski's request, a good faith effort was made to ascertain the existence of documents responsive to the request. I contacted each of the 8 listed institutions regarding this request. If the requested information exists, it would be maintained by each individual institution.

5. Jeffrey Bigam, SCI-Fayette's Corrections Activities, indicated that the information requested would have to come directly from Netflix's site, and is not a record the institution maintains.

6. Specifically, Mr. Bigam indicated that the information requested from the Netflix history was difficult to print off directly from the Netflix site and would require additional work on their end to convert the information into a new document.

7. Based on Mr. Bigam's response, I sent a follow-up email to the other 7 institutions informing them they did not need to create a document such as the one described by Mr. Bigam in response to the RTKL request.

8. Thus, I can state that after conducting a good faith search of the Department's records no responsive records currently exist within the Department's possession.

See Exhibit A, ¶¶ 4-8.

"In the absence of any evidence that the Department has acted in bad faith or that the records do, in fact, exist, 'the averments in [the affidavit] should be accepted as true.'" *Foster v. Pa. Dep't of Corr.*, 159 A.3d 1020, 1021 (Pa. Cmwlth. 2017). Here, Mr. Michalski has provided no evidence that the Department has acted in bad faith or that any responsive records do, in fact, exist. Rather, he simply asserts that he previously requested and received copies of similar records. However, Mr. Michalski's position simply does not overcome the Department's clear establishment of the nonexistence of records responsive to his request.

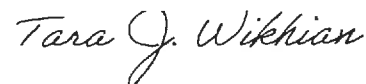
Moreover, the information sought by Mr. Michalski is not a record as defined by the RTKL. *See* 65 P.S. § 67.102. Specifically, the request does not seek information that is "created, received or retained pursuant to law or in connection

with a transaction, business or activity” of the Department. *Id.* As Deputy AORO Grant attests, the Netflix history sought by Mr. Michalski would have to come directly from Netflix’s site and is not a record the institutions maintain. *See Exhibit A*, ¶ 5. In fact, as evidenced by *Exhibit A* ¶ 6, the Netflix history report would require the Department to create a record which does not currently exist, which is strictly prohibited by the RTKL. *See* 65 P.S. § 67.705.

As discussed, Mr. Michalski’s Appeal contains no evidence that the Department has acted in bad faith or that responsive records do, in fact, exist. Therefore, the averments made by the Department’s Deputy AORO in the Declaration attached hereto as *Exhibit A* should be accepted as true, just as the OOR and the Commonwealth Court have done in numerous similar instances. *See Hodges v. Department of Health*, 29 A.3d 1190, 1192 (Pa. Cmwlth. 2011) (affidavit of agency’s Open Records Officer was dispositive evidence that requested records did not exist); *Moore v. Office of Open Records*, 992 A.2d 907, 908-909 (Pa. Cmwlth. 2010) (agency’s submission of sworn and unsworn affidavits that it was not in possession of requested records was sufficient to satisfy its burden of proving non-existence of record).

Based upon the foregoing, the Department respectfully requests that this Appeal be dismissed as the attached uncontested Declaration of the Department’s Deputy AORO serves as credible, sufficient evidence of the non-existence of any responsive records.

Sincerely,



Tara J. Wikhian
Assistant Counsel

cc: Smart Communications/PA DOC, Michael Michalski, GJ8047, SCI-Albion
(via regular mail)

DECLARATION OF KIMBERLY GRANT

I, Kimberly Grant, hereby declare under the penalty of unsworn falsification, pursuant to 18 Pa. C.S. § 4904, that the following statements are true and correct based upon my personal knowledge, information, and belief:

1. Currently, the Pennsylvania Department of Corrections (“Department”) employs me as its Deputy Agency Open Records Officer (“Deputy AORO”).

1. I have been employed by the Commonwealth of Pennsylvania for over ten (10) years in total and was appointed to my current position as the Department’s Deputy AORO in September of 2021.

2. As Deputy AORO, I am responsible for logging in and issuing responses to all Right-to-Know Law (“RTKL”) requests received by the Department, as well as coordinating the research and information-gathering efforts in response to each request.

3. On January 31, 2023, the Department received an RTKL request from Michael Michalski, seeking, *inter alia*, the Netflix history for movies ordered/shipped, from June 2019 through October 31, 2021, for 8 specific institutions. *See Request.*

4. In response to Mr. Michalski’s request, a good faith effort was made to ascertain the existence of documents responsive to the request. I contacted each of the 8 listed institutions regarding this request. If the requested information exists, it would be maintained by each individual institution.

5. Jeffrey Bigam, SCI-Fayette’s Corrections Activities, indicated that the information requested would have to come directly from Netflix’s site, and is not a record the institution maintains.

6. Specifically, Mr. Bigam indicated that the information requested from the Netflix history was difficult to print off directly from the Netflix site and would require additional work on their end to convert the information into a new document.

7. Based on Mr. Bigam’s response, I sent a follow-up email to the other 7 institutions informing them they did not need to create a document such as the one described by Mr. Bigam in response to the RTKL request.

EXHIBIT A

8. Thus, I can state that after conducting a good faith search of the Department's records no responsive records currently exist within the Department's possession.

Kimberly Grant

Kimberly Grant
Deputy Agency Open Records Officer
Pennsylvania Department of Corrections

Date: March 7, 2023

DEAR APPEALS OFFICER EILERS,

3/16/23

RE: APPEAL NO.: 2023-0438

MICHAEL MICHALSKI V. PA DEPARTMENT OF CORRECTIONS

REQUESTER SUBMITS THIS INFORMATION AFTER THE RECORD WAS CLOSED PURSUANT TO GS P.S. § 1102(b)(3) (STATING THAT "THE APPEALS OFFICER SHALL RULE ON PROCEDURAL MATTERS OF JUSTICE, FAIRNESS, AND THE EXPEDITIOUS RESOLUTION OF THE DISPUTE") (SEE MICHALSKI V. GOVERNOR'S OFFICE OF ADMINISTRATION; DOCKET NO.: AP 2014-0887).

REFERENCE COUNSEL WIKHIAN'S POSITION STATEMENT AND DEPUTY AORO GRANT'S DECLARATION, REQUESTER PROVIDES THE FOLLOWING INFORMATION:

- 1) COUNSEL WIKHIAN AND DEP. AORO GRANT ADMIT, CLEARLY, THAT A RECORD EXISTS IN THEIR POSITION STATEMENT, THEN LATER IN THE STATEMENT, SAY IT DOESN'T EXIST BECAUSE IT IS DIFFICULT TO PRINT.
- 2) DEP. AORO GRANT, FURTHER STATES THAT SHE EMAILED EACH OF THE 7 OTHER INSTITUTIONS AND TOLD THEM NOT TO PRINT THE RECORDS BECAUSE ONE INSTITUTION (SCI-FAYETTE) HAD TROUBLE PRINTING.
- 3) AS EVIDENCED IN THE APPEAL, AND NOTED IN THE POSITION STATEMENT, I HAVE RECEIVED THESE RECORDS PREVIOUSLY AND MANY WERE PRINTED DIRECTLY FROM THE SITE.
- 4) AS RELATED TO 'CONSTRUCTIVE POSSESSION' § 901, THE REQUEST DOCUMENTS

A TRANSACTION OF AN AGENCY; PA DOC ↔ NETFLIX.

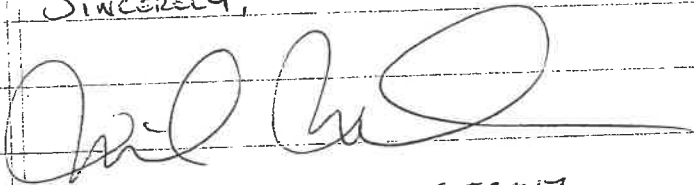
- 5) § 67.506, (d) AGENCY POSSESSION, (1) STATES: "A PUBLIC RECORD THAT IS NOT IN THE POSSESSION OF AN AGENCY BUT IS IN THE POSSESSION OF A PARTY WITH WHOM THE AGENCY HAS CONTRACTED TO PERFORM A GOVERNMENTAL FUNCTION ON BEHALF OF THE AGENCY, AND WHICH DIRECTLY RELATES TO THE GOVERNMENTAL FUNCTION AND IS NOT EXEMPT UNDER THIS ACT, SHALL BE CONSIDERED A PUBLIC RECORD OF THE AGENCY FOR PURPOSES OF THIS ACT." IT CANNOT BE ARGUED THAT THERE IS A FINANCIAL AGREEMENT BETWEEN THE PA DOC AND NETFLIX FOR NETFLIX TO PROVIDE A SERVICE, RECORDS RELATED TO THE SERVICE ARE A TRANSACTION OF THE PA DOC AND ARE NOT EXEMPT.
- 6) THE NETFLIX HISTORY IS A DATABASE OF ALL TRANSACTIONS BETWEEN THE PA DOC AND NETFLIX. THE NETFLIX HISTORY CAN ALSO BE DOWNLOADED FROM THE NETFLIX WEBSITE IN A .CSV FILE AND OPENED WITH MICROSOFT EXCEL AS A DATABASE IF IT IS UNABLE TO BE PRINTED DIRECTLY FROM THE WEBSITE. "DRAWING INFORMATION FROM A DATABASE DOES NOT CONSTITUTE CREATING A RECORD UNDER THE PA RTKL, 65 PA STAT. ANN. §§ 67.101-67.3104." "AN AGENCY CAN BE REQUIRED TO DRAW INFORMATION FROM A DATABASE, ALTHOUGH THE INFORMATION MUST BE DRAWN IN FORMATS AVAILABLE TO THE AGENCY. IN SHORT, TO THE EXTENT REQUESTED INFORMATION EXISTS IN A DATABASE, IT MUST BE PROVIDED; AN AGENCY CANNOT CLAIM OTHERWISE UNDER § 705 OF THE PA RTKL, 65 PA. STAT. ANN. §§ 67.101-67.3104. 65 PA. STAT. ANN. § 67.705" (COMMONWEALTH OF PA DEP V. VERA COLLE 9/12/16 LEXISNEXIS HEADNOTES). WHETHER PRINTED DIRECTLY FROM

E-3

THE NETFLIX SITE OR PRINTED FROM THE DOWNLOADABLE .CSV
FILE THROUGH MICROSOFT EXCEL IN THE RANGES REQUESTED, THIS
DATABASE INFORMATION MUST BE PROVIDED.

IT IS CLEAR THAT THE PA DOC IS TRYING TO DENY RECORDS CONTRARY
TO THE PA RTKL, IF THIS WASN'T CLEAR THROUGH THE INITIAL DENIAL
AND APPEAL, THE PA DOC'S POSITION STATEMENT MAKES IT CLEAR.

SINCERELY,



MICHAEL MICHALSKI GJ8047

SMART COMMUNICATIONS/PA DOC

MICHAEL MICHALSKI GJ8047

PO BOX 33028

ST. PETERSBURG, FL 33733



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

MICHAEL MICHALSKI,
Requester

v.

PENNSYLVANIA DEPARTMENT OF
CORRECTIONS,
Respondent

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: **Docket No: AP 2023-0438**
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FACTUAL BACKGROUND

On January 31, 2023, Michael Michalski (“Requester”), an inmate at SCI-Albion, filed a request (“Request”) with the Pennsylvania Department of Corrections (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking the movies ordered from and shipped by Netflix to each one of eight specified correctional institutions between June of 2019 and October 31, 2021. The Request specified that it “seeks these records [to] be printed directly from the Netflix history tab...”.¹ On February 14, 2023, after invoking an extension to respond, *see* 65 P.S. § 67.902(b), the Department denied the Request, arguing that the requested histories are not records of the Department and, as such, do not exist in the Department’s possession, custody or control.

¹ The Request also sought the meeting minutes from the most recent Department Commissary Committee meeting. The Department provided these records, redacted of the first names of corrections officers, and the Requester does not challenge this aspect of the Department’s response on appeal. As a result, the Requester has waived any objections to the Department’s response to this item of the Request. *See Pa. Dep’t of Corr. v. Off. of Open Records*, 18 A.3d 429 (Pa. Commw. Ct. 2011).

On February 28, 2023, the Requester filed an appeal with the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure. The Requester argues that each of the identified correctional institutions paid for a Netflix subscription out of each institution’s Inmate General Welfare Fund and that the institutions access Netflix on Department computers. Further, the Requester argues that the Department has previously provided Netflix histories to him, although he acknowledges that some of the institutions had provided a Word document with the requested information. The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On March 7, 2023, the Department submitted a position statement, reiterating its arguments. In support, the Department provided the statement made under the penalty of unsworn falsification to authorities by its Deputy Open Records Officer, Kimberly Grant. On March 17, 2023, the Requester mailed a response to the evidence submitted by the Department, arguing that the Department’s acknowledgment that the histories do exist is inconsistent with the argument that no record exists, especially because the basis of the latter argument appears to be that the histories are difficult to print. The Requester argues that the histories are records of the Department because they document a transaction of the Department; alternatively, they are accessible through Section 506(d) of the RTKL. *See* 65 P.S. § 67.506(d). Further, the Requester argues that the histories can be downloaded from Netflix as a .csv file and opened with Microsoft Excel; this belies the Department’s argument that they are hard to print. Moreover, drawing information from a database does not constitute the impermissible creation of a record. *See* 65 P.S. § 67.705.

LEGAL ANALYSIS

The Department is a Commonwealth agency subject to the RTKL. 65 P.S. § 67.301. Records in the possession of a Commonwealth agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. As an agency subject to the RTKL, the Department is required to demonstrate, “by a preponderance of the evidence,” that records are exempt from public access. 65 P.S. § 67.708(a)(1). Preponderance of the evidence has been defined as “such proof as leads the factfinder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

The Department argues that the Netflix histories are not records of the Department. The RTKL defines a “record” as “[i]nformation, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency.” 65 P.S. § 67.102. The RTKL imposes a two-part inquiry for determining if certain material is a record: 1) does the material document a “transaction or activity of an agency?” and 2) if so, was the material “created, received or retained ... in connection with a transaction, business or activity of [an] agency?” *See* 65 P.S. § 67.102; *Allegheny Cnty. Dep’t of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1034-35 (Pa. Commw. Ct. 2011). Because the RTKL is remedial legislation, the definition of “record” must be liberally construed. *See A Second Chance*, 13 A.3d at 1034; *Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at *13 (Pa. Commw. Ct. Jan. 12, 2012) (“[H]ow [can] any request that seeks information ... not [be] one that seeks records[?]”). In *A Second Chance*, the Commonwealth Court interpreted the word “documents”

as meaning “proves, supports [or] evidences” and held that certain requested information met the first part of the definition of a record because it documented the existence of a governmental action. 13 A.3d at 1034.

Here, the Grant attestation provides that:

4. In response to [the R]equest, a good faith effort was made to ascertain the existence of documents responsive to the [R]equest. I contacted each of the 8 listed institutions regarding this [R]equest. If the requested information exists, it would be maintained by each individual institution.
5. Jeffrey Bigam, SCI-Fayette’s Corrections Activities [sic], indicated that the information requested would have to come directly from Netflix’s site, and is not a record the institution maintains.
- ...
8. Thus, I can state that after conducting a good faith search of the Department’s records no responsive records currently exist within the Department’s possession.

Under the RTKL, an affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Off. of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the Department has acted in bad faith, “the averments in the [attestation] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’t Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Off. of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

Here, the Request facially seeks documents from Netflix’s website. The Requester argues that the Department can download the histories as .csv files. However, agencies are not required to create records, and the fact that some correctional institutions may have provided this information to the Requester in the past is inconsequential to this analysis. *See* 65 P.S. § 67.705. Nevertheless, as the Requester points out, the histories document the Department’s activity of ordering movies for inmates to watch. The question then become whether they are maintained in

connection with this activity. As the Grant attestation establishes, they are not. Accordingly, the Department has met its burden of proving that the Netflix histories are not records of the Department. *See* 65 P.S. § 67.305.

The Requester argues that the records are accessible under Section 506(d) of the RTKL, which provides that *public records* that are not in the possession of the agency but are in the possession of a third party are accessible if certain conditions are satisfied. *See* 65 P.S. § 67.506(d)(1) (emphasis supplied); *Dental Benefit Providers, Inc. v. Eiseman*, 86 A.3d 932, 938-39 (Pa. Commw. Ct. 2014) (citation omitted), *aff'd*, 124 A.3d 1214 (Pa. 2015). The RTKL defines “public record” as a record of a Commonwealth or local agency. *See* 65 P.S. § 67.102. However, as established above, the Netflix histories are not records of the Department, nor is there any evidence that they are records of any other local or Commonwealth agency. Rather, the Request seeks records from the Netflix’s website; while Netflix is a publicly traded corporation, it is plainly not a local or a Commonwealth agency. *See id.* (defining “local agency” and “Commonwealth agency”); <https://www.forbes.com/companies/netflix/?sh=fe2452c8541f> (last accessed March 24, 2023). As such, Section 506(d) does not apply to the Netflix histories, and the OOR need not assess whether the conditions required to access records under Section 506(d) are satisfied in this instance.

CONCLUSION

For the foregoing reasons, the Requester’s appeal is **denied**, and the Department is not required to take any further action. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Commonwealth Court. 65 P.S. § 67.1301(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of

the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.² This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: March 28, 2023

/s/ Blake Eilers

Blake Eilers, Esq.

Appeals Officer

Sent to: Michael Michalski, GJ8047 (via regular mail);

Tara Wikhian, Esq. and Andrew Filkosky (via portal access only)

² See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

1-ALB













G-1

Returned

Shipped


Rating

Title

1		Gungrave Season 1 [NR] Disc 5	★★★★★	11/15/21	
2		Gungrave Season 1 [NR] Disc 3	★★★★★	11/15/21	
3		Gungrave Season 1 [NR] Disc 2	★★★★★	11/15/21	
4		Gungrave Season 1 [NR] Disc 4	★★★★★	11/15/21	
5		Gosnell: The Trial of America's Biggest Serial Killer 2018 [PG-13] 1h 33m	★★★★★	11/10/21	
6		The Secret Garden 2020 [PG] 1h 39m	★★★★★	11/10/21	
7		Appleseed: Alpha 2014 [PG-13] 1h 33m	★★★★★	11/10/21	
8		The Boondocks Season 1 [TV-MA] Disc 1	★★★★★	10/29/21	11/15/21
9		The Boondocks Season 1 [TV-MA] Disc 2	★★★★★	11/03/21	11/15/21
10		The Boondocks Season 1 [TV-MA] Disc 3	★★★★★	11/03/21	11/15/21
11		Ghost in the Shell 2: Innocence 2004 [PG-13] 1h 40m	★★★★★	11/03/21	11/15/21
12		Under the Shadow 2016 [PG-13] 1h 24m	★★★★★	10/29/21	11/12/21

Michael A. Michalski,)
Petitioner,)
))
v.) No.
))
PENNSYLVANIA DEPARTMENT OF)
CORRECTIONS and KIMBERLY)
GRANT, (DAORO))
Respondents,)

I Michael A. Michalski, proceeding *pro se* in the above captioned matter do hereby aver and declare that the facts set forth in the foregoing document are true and correct to the best of my knowledge, information and belief, and that any false statements herein are subject to the penalties of perjury provided for by **18 Pa. C.S. §4904**, relating to unsworn falsification to authorities.

Signature: 
Michael A. Michalski
D.O.C # GJ8047
SCI-Albion
10745 Route 18
Albion, PA 16475-0002

Michael A. Michalski,)
Petitioner,)
)
 v.) No.
)
 PENNSYLVANIA DEPARTMENT OF)
 CORRECTIONS and KIMBERLY)
 GRANT, (*DAORO*))
Respondents,)

I Michael A. Michalski, hereby certify that I am, on this date, causing a copy of the foregoing document to be served upon the persons and in the manner indicated below.

Executive Director
Office of Open Records
333 Market Street
16th Floor
Harrisburg, PA 17101

Michael A. Michalski GJ8047

Michael Michalski GJ8047
SCI-Albion
10745 Route 18
Albion, PA 16475-0002